

ARTHUR F. PIERCE and ONEIDA	:	Order Dismissing Appeal
INDIAN NATION OF NEW YORK,	:	
Appellants	:	
	:	
v.	:	Docket No. IBIA 95-51-A
EASTERN AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	February 24, 1995

Appellants Arthur F. Pierce and the Oneida Indian Nation of New York sought review of an October 14, 1994, decision of the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to issue Pierce a deputy special officer commission (DSOC). The Board of Indian Appeals (Board) dismisses this appeal.

The Board received the appeal on November 8, 1994. On December 8, 1994, it received a memorandum from the Assistant Secretary - Indian Affairs (Assistant Secretary) stating her intention to assume jurisdiction over the appeal under 25 CFR 2.20(c) and 43 CFR 4.336. These regulations provide procedures under which the Assistant Secretary can assume jurisdiction over an appeal filed with the Board during the 15-day period following her receipt of the appeal. By order dated December 8, 1994, the Board concluded that the Assistant Secretary's attempt to assume jurisdiction was not timely under the regulations, and instructed the Area Director to continue preparation of the administrative record.

On December 21, 1994, the Board was furnished with a copy of a memorandum of the same date from the Acting Deputy Commissioner of Indian Affairs (Deputy Commissioner) to the Area Director. The memorandum indicated that the Deputy Commissioner was aware of the appeal pending before the Board but believed that "justice [could] be more quickly and efficiently served by [BIA's] issuance of the requested DSOC." The memorandum continued with a request that the Area Director review the record and issue a DSOC unless she found a compelling reason not to do so.

By order dated December 22, 1994, the Board stated:

The [memorandum] is subject to an unfortunate interpretation--that the  
 \* \* \* Deputy Commissioner is requesting the Area Director to violate  
 Departmental appeal regulations by taking action on a matter pending before the  
 Board. The Board has consistently held that, once an appeal has been filed with  
 the Board,

BIA loses jurisdiction over the matter except to participate in the appeal as a party. E.g., United Auburn Indian Community v. Sacramento Area Director, 24 IBIA 33, 38-39 (1993), and cases cited therein. As stated in that decision: "[T]he rule is part of any orderly review process and is intended to ensure that only one forum at a time has authority to act in a matter."

The Board advised the parties that the Area Director could request that the matter be remanded to her for the purpose of reconsidering the decision or for granting the relief requested, or that the Deputy Commissioner could request that the Secretary of the Interior assume jurisdiction over the appeal under 43 CFR 4.5 and delegate authority to decide the appeal to the Assistant Secretary.

Neither course of action was taken, and appellants subsequently filed their opening brief on January 18, 1995.

On January 27, 1995, the Board received a document entitled "Suggestion of Mootness" from appellants. The document stated:

Appellants \* \* \* suggest that this appeal has become moot. Upon subsequent application, the [BIA] has issued a [DSOC] to \* \* \* Pierce \* \* \*. Accordingly, the controversy arising from denial of a prior application is moot. The decision below should be vacated, and the matter should be remanded with instructions to dismiss the prior application.

The Board issued an order on January 30, 1995, requesting a copy of the subsequent application and of the DSOC in support of appellants' suggestion of mootness. The response was due on or before February 10, 1995.

On February 10, 1995, the Board received a "Stipulated Notice of Dismissal" from counsel for appellants and counsel for the Area Director. The notice stated that "[t]he parties \* \* \* hereby notify the Board that they stipulate and agree to the dismissal of this appeal. In this regard, the parties acknowledge that there is no issue of controversy or grievance presently pending before the Board."

The Board actively encourages the settlement of disputes before it and has no problem in dismissing appeals on the basis of settlements. It now appears that it was the real intention almost from the beginning of this appeal to settle the matter by issuing the DSOC. Settlement could have been effected in a manner which did not violate BIA's appeal regulations and did not give rise to questions concerning the validity of the DSOC ultimately issued. For instance, the parties might, very simply, have reached and presented to the Board a settlement agreement under which BIA agreed to issue a DSOC once the Board had dismissed appellant's appeal on the basis of the settlement.

Rather than properly settling this dispute or exercising one of the options described in the Board's December 22, 1994, order, the parties used

the transparent ruse of a "subsequent application," with the evident objective of circumventing the Board. The Board can only express disappointment and concern that some BIA officials, evidently including the Deputy Commissioner, have shown so little respect for their own appeal regulations.

In the context of this case, the most serious consequence of the BIA action is, as alluded to above, the possibility that questions will arise concerning the validity of the DSOC because it was issued by a BIA official at a time when jurisdiction over the matter did not lie with BIA. In a broader context, BIA's actions reflect poorly upon its commitment to an orderly and impartial review process.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Eastern Area Director's October 14, 1994, decision is dismissed with prejudice on the basis of a joint stipulation that there are no issues in controversy between the parties.

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Kathryn A. Lynn  
Chief Administrative Judge

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Anita Vogt  
Administrative Judge